APPENDIX D

Opinion Of The Referee In Bankruptcy

1. Question Presented.

Whether money loaned or advanced to John Milton Addison by various persons is or is not under all the circumstances taxable income to John Milton Addison.

2. Findings of Fact.

1. John Milton Addison, the uranium promoter, was on July 7, 1960, adjudicated a bankrupt upon an involuntary petition filed against him in this court on February 23, 1960. William J. Rochelle, Jr., was duly elected Trustee of the estate at the first meeting of creditors on August 23, 1960, and has continued to serve in that capacity since that date.

2. On July 2, 1959, the Secretary of the Treasury through his delegate terminated the tax year of Addison pursuant to Section 6851 of the Internal Revenue Code of 1954 (26 U.S.C., 1958, Ed., Section 6851) and assessed a tax liability for the period from January 1, 1959, through June 30, 1959, in the amount of $124,485.24.

3. On July 3, 1959, the District Director of the Internal Revenue Service served a notice of levy with respect to the tax liability on Braniff Airways, Inc., which at that time was holding checks and money orders for John Milton Addison, the Bankrupt. On July 6, 1959, a notice of lien with respect to the tax liability was filed by the District Director of the Internal Revenue Service in the office of the County Clerk of Dallas County, Texas.

4. Subsequently, on July 10, 1959, a second notice of levy and final demand was served on Braniff Airways, Inc.

5. The checks and money orders in the possession of Braniff Airways, Inc., totaled $146,625.00 and consisted of $125,700.00 in cashier's checks, bank money orders and American Express money orders, and $20,925.00 in personal checks payable to John Milton Addison.

6. These checks on July 10, 1959, were placed in the custody of the Marshal of the United States District Court for the Northern District of Texas. Thereafter, on July 19, the District Court ordered these checks and money orders delivered to the Receiver in Bankruptcy. On August 9, 1960, the District Court amended its order to provide that the delivery of the checks and money orders to the Receiver would be subject to the rights of the United States, if any, which it may have acquired by the levy on July 3, 1959, on Braniff Airways, Inc., for the alleged tax liability of John Milton Addison in the sum of $125,076.03, plus interest and penalties according to law.

7. On February 23, 1961, the United States filed herein its proof of claim for taxes, which claim was subsequently amended by a proof of claim filed on July 27, 1965, in the amount of $1,030,848.97 with interest thereon, which proof of claim is attached and made a part of this certificate. Only the tax liability for the period January 1, 1959, through June 30, 1959, is claimed by the United States to be secured by lien and levy prior to bankruptcy and therefore entitled to priority over the expenses of administration in this proceeding. If this liability is found by the Court to be due

and owing, satisfaction of the claim will exhaust all the proceeds in this proceeding. All of the money sought to be taxed as income, as set forth in its proof of claim, was received from advances made to the Bankrupt by third parties in reliance upon the promise of the Bankrupt to repay the amounts advanced with interest or other substantial benefits.

8. The advances received by Addison during the year 1959 amounted at least to the sum of $833,000.

9. It is the position of the Government that these moneys obtained from third persons are the proceeds from a swindling operation and are therefore taxable. It is the position of the Trustee that the moneys were loaned to the Bankrupt and are therefore not taxable.

10. The bankrupt consistently, uniformly and unequivocally promised to repay the funds with interest which he received during the period beginning in 1955 and continuing to about July 7, 1960, the date of his adjudication as a bankrupt. During the years 1955, 1956, 1957, 1958, and most of the year 1959, the Bankrupt issued written promissory notes payable to the lenders. Upon complaint of the Securities and Exchange Commission that these promissory notes were securities and were being issued in violation of the Securities Act, the Bankrupt during the year 1959 ceased issuing notes for money advanced to him and thereafter orally contracted to repay all amounts advanced to him with interest.

11. In order to induce the lenders to let him have the money, the Bankrupt, either in person or by and through his associates, made false and fraudulent misrepresentations of fact, among which are the following:

A. That Merrill Lynch, Pierce, Fenner & Bean had offered to purchase 49% of his money interest for the sum of 18 Million Dollars.

B. That the Bankrupt owned patent rights to the Bensen Upgrader which at a cost of $65,000.00 would replace a uranium mill costing 13 Million Dollars, and that such mill would earn a net profit of $86,000.00 a day.

C. That the Bankrupt owned a uranium mine containing 2½ Million Dollars worth of uranium.

D. That a nephew of Clint Murchison, a well known financial figure was backing the Bankrupt's uranium ventures.

E. That J. C. Tonn, an associate of the Bankrupt, was a chief chemist with long experience with an oil company.

F. That the Bankrupt or companies controlled by him had mineral right to approximately 20,000 acres of land in the Arapahoe National Forest near Granby, Colorado, containing vast nickel deposits.

G. That the Bankrupt or companies owned or controlled by him had rights to timber standing on 20,000 acres in the Arapahoe National Forest near Granby, Colorado.

H. That the Bankrupt was going to build a luxury hotel near Golden, Colorado, and that he had made arrangements to bring water to the location on the top of Tabletop Mountain and that the Murchison family of Texas was financing this venture.

12. The third parties who advanced money to the Bankrupt believed that they were making loans to him and would receive repayment of the money loaned to him with substantial increments thereto. They would not have let him have the money in the absence of such promises.

13. There was no restriction upon the use of the money obtained by the Bankrupt as a result of the foregoing described transactions.

14. There was, in every transaction wherein the Bankrupt obtained any money sought to be taxed herein as income, as consensual recognition between the Bankrupt and lenders, express in some instances and implied in the remaining instances, of the obligation of the Bankrupt to repay to the lender the money advanced to him.

15. There is no evidence that the Bankrupt in fact did in good faith intend to repay the money or interest thereon in accordance with his promises, and the inference which I draw from the evidence is that he had no such intention.

4. Opinion of Referee.

In *James v. United States*, 366 U.S. 213, a criminal proceeding, the United States Supreme Court by a divided Court, held that embezzled funds are taxable income to the embezzler. Both the majority and dissenting opinions in this case agree that borrowed funds are not taxable.

In the Addison case the contest is between the taxing authorities and defrauded lenders represented by the trustee in bankruptcy. The issue resolves itself into the question

of whether the subjective intent of the borrower, undisclosed to trusting lenders, not to repay the money received by him converts into taxable income money which would otherwise be nontaxable.

I think the answer is in the negative, at least in a contest between the taxing authorities and the defrauded lenders represented by the Trustee in Bankruptcy as to who gets the money. In these circumstances I think that a board definition should be accorded the term "loan." If the issue arose between the taxing authorities and the fraudulent borrower, conceivably the answer might be different.

Respectfully submitted,

/s/ ELMORE WHITEHURST
Referee in Bankruptcy